BEFORE THE SECRETARY OF STATE
STATE OF COLORADO

CASE NO. OS 2006-0035

ORDER GRANTING RESPONDENTS' MOTION FOR DISMISSAL and AGENCY DECISION

IN THE MATTER OF THE COMPLAINT FILED BY CARL RUCH REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY RAYMOND NEAL POCOCK, ERNEST J. BERGAMO, ANDREW MORRIS and KENNETH TRIBBEY.

This matter is before the Administrative Law Judge (ALJ) upon the complaint of Carl Ruch that four candidates for election to the Perry Park Metropolitan District Board of Directors violated the fair campaign finance laws by accepting contributions and then failing to file required contribution and expenditure reports. Hearing of this complaint was held December 12, 2005 at the Office of Administrative Courts. Mr. Ruch, a non-attorney, represented himself. Respondents Pocock, Bergamo, Morris and Tribbey were all represented by Paul C. Rufien, Esq. After presentation of Complainant's case, Respondents moved for dismissal. The ALJ granted the motion and now renders the Agency Decision in Respondents' favor.

Background and Issue Presented

On November 2, 2006, Complainant electronically filed a complaint with the Secretary of State alleging campaign finance violations by Respondents, who were all successful candidates for election to the Perry Park Metropolitan District (Metro District) Board of Directors. Consistent with Secretary of State rule 6.3, 8 CCR 1505-6, Complainant mailed the signed complaint to the Secretary of State. It was received on November 6, 2006. As required by Colo. Const. art. XXVIII, § 9(2)(a), the Secretary of State referred the complaint to the Office of Administrative Courts (OAC) for hearing. The OAC received the complaint on November 7, 2006, and initially scheduled the matter for hearing November 21, 2006. On that date, both parties appeared at the OAC and Respondents requested an automatic extension of time as provided by Colo. Const. art. XXVIII, § 9(2)(a). Hearing was reset for December 12, 2006. At the completion of Complainant's case, Respondents filed this motion to dismiss.

Complainant alleges that each of the four Respondents accepted contributions in excess of $20 in value, and therefore should have filed required contribution and expenditure reports. Specifically, Complainant alleges that Respondents received the benefit of political advertisements (flyers and a yard sign) that were paid for by other individuals. Respondents do not deny these individuals prepared political advertisements supporting their election, but deny the advertising was a contribution to

their campaign because they exercised no coordination or control over it.

The issue presented is whether Complainant's evidence proves that Respondents each received contributions in the form of political advertising, and if so, whether the fair market value of the advertising exceeded the $20 limit that triggers reporting obligations.

Standard Applicable to Motions for Dismissal at the Conclusion of Complainant's Case

Colo. Const. art. XXVIII, § 9(1)(f) directs that hearings of alleged fair campaign law violations be conducted according to the provisions of the Administrative Procedure Act, § 24-4-105, C.R.S. That section, in turn, adopts the district court civil rules of practice, to the extent practicable. Section 24-4-105(4). Rule 41(b)(1) of the Colorado Rules of Civil Procedure permits the court to grant a defendant's motion for dismissal at the conclusion of the plaintiff's case if "upon the facts and the law the plaintiff has shown no right to relief." If the court grants the motion, the dismissal of plaintiff's case operates as an adjudication upon the merits. The standard is not whether the plaintiff established a *prima facie* case, but whether judgment in favor of defendant is justified on the evidence presented. *City of Aurora ex rel. Util. Enter. v. Colo. State Eng'r,* 105 P.3d 595, 614 (Colo. 2005); *Teodonno v. Bachman*, 158 Colo. 1, 4, 404 P.2d 284, 285 (1965); *Rowe v. Bowers*, 160 Colo. 379, 381, 417 P.2d 503, 505 (1966). When, after considering all the evidence, the trial judge is convinced that there is no basis upon which a verdict in favor of the plaintiff could be supported, it is his duty as a matter of law to sustain a motion for dismissal. *McSpadden v. Minick,* 159 Colo. 556, 413 P.2d 463, 466 (1966). In deciding whether the evidence justifies judgment in favor of Respondents, the ALJ also considers that Complainant is the proponent of an order finding a fair campaign law violation, and therefore bears the burden of proof. Section 24-4-105(7), C.R.S. ("the proponent of an order shall have the burden of proof").

Findings of Fact

1. The Metro District is a residential subdivision in Douglas County with approximately 650 households. It is a "metropolitan district" within the meaning of § 32-1-103(10), C.R.S. and hence a "special district" within the meaning of § 32-1-103(20).

2. On May 2, 2006, the Metro District held an election to elect board members. The four named respondents, all residents of the Metro District, were candidates. Complainant is also a resident of the Metro District, but was not a candidate in this election.

3. Prior to the election, each of the Respondents filed a "Self-Nomination and Acceptance" form announcing his candidacy for election to the Metro District board. By signing the form, each Respondent acknowledged familiarity with the Colorado Fair Campaign Practices Act. None of the Respondents registered with the Douglas County Clerk and Recorder as a candidate committee. None of the Respondents spent any money on the campaign, or solicited contributions to their campaign. None of the Respondents filed campaign expenditure or contribution reports with the Douglas

County Clerk and Recorder.

4. Prior to the election, two individuals, Deborah Thurlow and Lowell Johnson, produced political advertising that expressly advocated Respondents' election. Ms. Thurlow's advertisement was in the form of a flyer. Mr. Johnson's advertisement was in the form of a single yard sign.

The flyer

5. Ms. Thurlow used printing equipment in her home to prepare a quantity of laminated flyers that urged voters to "Vote For" the Respondents. Each flyer was approximately 4.25" by 5.5" in size, with color printing on the front and black and white printing on the reverse. None of the Respondents asked Ms. Thurlow to produce the flyers, nor did they pay Ms. Thurlow for their production or provide any input, advice or direction to her regarding their design or production. There was no evidence that Ms. Thurlow is employed by, related to, or otherwise subject to the influence of any of the Respondents.

6. Approximately two weeks before the election, Ms. Thurlow delivered an unspecified quantify of the flyers to Respondent Morris. Approximately a week before the election, Respondent Pocock also received an unspecified quantity of the cards. Respondents Tribbey and Bergamo received an unspecified quantity of the flyers at the polling place on election day. Over the course of election day, each Respondent handed out an unspecified quantity of the flyers to voters as the voters drove into the polling place parking lot. 431 Metro District residents voted at the polling place on election day, but not every voter received a card, and it is not known how many flyers each Respondent handed out individually, or collectively.

7. Ms. Thurlow did not testify and there is no direct evidence as to the fair market value of the flyers or even how many flyers she produced.[1]

8. Complainant produced evidence that a commercial printer in the Denver area would charge $216 to produce 600 flyers of similar description.

The yard sign

9. Mr. Johnson produced an 18" by 24" two-sided color yard sign urging Respondents' election. It was placed near the driveway leading to the polling place. None of the Respondents asked Mr. Johnson to produce the yard sign, nor did they pay Mr. Johnson to produce it or provide any input, advice or direction to him regarding its design, production or placement. There is no evidence of any communication between Mr. Johnson and the Respondents regarding the yard sign, nor evidence that Mr. Johnson is employed by, related to, or otherwise subject to the influence of any of the Respondents.

10. Unlike Ms. Thurlow's flyers, none of the Respondents accepted

[1] The ALJ sustained Complainant's objection to the admission of an affidavit from Ms. Thurlow as hearsay.

possession of the yard sign or made any use of it to further their bid for election.

11. Mr. Johnson did not testify, and there is no direct evidence as to the fair market value of the sign. Complainant did produce evidence that a printer in the Castle Rock area would charge $45 to prepare a sign of similar description.

Discussion and Conclusions of Law

Colorado's Campaign Finance Laws

The primary campaign finance law in Colorado is Article XXVIII of the Colorado Constitution, which was approved by the people of Colorado in 2002 as Amendment 27 to the constitution. Article XXVIII imposes contribution limits, encourages voluntary spending limits, imposes reporting and disclosure requirements, and vests enforcement authority in the Secretary of State. Colorado also has statutory campaign finance law, known as the Fair Campaign Practices Act (FCPA), §§ 1-45-101 to 118, C.R.S., which was originally enacted in 1971, repealed and reenacted by initiative in 1996, substantially amended in 2000, and again revised by initiative in 2002 as the result of passage of Amendment 27. The Secretary of State further regulates campaign practices pursuant to regulations published at 8 CCR 1505-6.

Disclosure of contributions and expenditures

Article XXVIII regulates contributions to "candidate committees." The definition of a "candidate committee" includes the candidate individually, so even candidates who do not formally establish committees are still subject to the contribution rules. Article XXVIII, § 2(3). A "contribution" includes not only direct contributions of money to a candidate, but also "The fair market value of any gift … made to any candidate committee" and "Anything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate's … election." Article XXVIII, §§ 2(5)(a)(III) and (IV), respectively.

Article XXVIII also regulates, to a limited degree, expenditures by a candidate. An "expenditure" is "any purchase, payment, distribution, loan, advance, deposit, or gift of money by any person for the purpose of expressly advocating the election or defeat of a candidate." Article XXVIII, § 2(8)(a).

Generally, candidate committees must report contributions and expenditures to the "appropriate officer" in accordance with the requirements of § 1-45-108, C.R.S. of the FCPA. *See* Article XXVIII, § 7, which adopts the reporting requirements of § 1-45-108. In the case of special district elections, the "appropriate officer" is the county clerk and recorder. Section 1-45-109(1). However, special district candidate committees need not file any report until the candidate committee has received contributions or made expenditures exceeding twenty dollars in the aggregate. Section 1-45-108(1)(c).

Failure to file the required reports subjects the candidate to significant monetary penalties as specified in Article XXVIII, § 10.

Independent expenditures – the requirement for control or coordination

Although the definition of "contribution" in Article XXVIII, § 2(5)(a)(IV) suggests that a contribution has occurred whenever a third party has directly or indirectly given "anything of value" to a candidate for the purpose of promoting the candidate's election, the Supreme Court of the United States, in the sentinel case of *Buckley v. Valeo,* 424 U.S. 1 (1976), held that an individual citizen's right to make expenditures on behalf of a candidate is a form of political speech protected by the First Amendment. The Supreme Court recognized, however, that expenditures by a non-candidate that were "controlled by or coordinated with" the candidate or his campaign committee might well have the same value to the candidate as a direct contribution and would, if left unregulated, encourage evasion of the contribution limits. *Id.* at 46. These "disguised contributions" are therefore subject to regulation. *Id.* at 47.

Thus, although the Supreme Court has routinely struck down restrictions on "independent" expenditures, it has upheld limitations upon expenditures that were coordinated with or controlled by a candidate, provided the limitations were directly related to the government's compelling interest in preventing the appearance of corruption. *See Co. Rep. Camp. Comm. v. Federal Election Comm'n* (*"Colorado I")*, 518 U.S. 604, 617 (1996)(holding that the First Amendment protects independent expenditures by political parties, the Court stated, "the constitutionally significant fact … is the lack of coordination between the candidate and the source of the expenditure"); *Federal Election Comm'n v. Colorado Republican Federal Campaign Comm. ("Colorado II")*, 533 U.S. 431 (2001) (holding that a political party's coordination of expenditures with its candidate was functionally equivalent to contributions to that candidate); and *McConnell v. Federal Election Commission*, 540 U.S. 93, 219 (2003)("Ever since our decision in Buckley, it has been settled that expenditures by a non-candidate that are 'controlled by or coordinated with the candidate and his campaign' may be treated as indirect contributions subject to … limitations").

Therefore, consistent with *Buckley,* an individual's expenditure for an advertisement supporting a candidate is not a contribution to the candidate unless the expenditure was coordinated with or controlled by the candidate.[2] This rule is reflected in Article XXVIII, §§ 2(9), which treats coordinated or controlled expenditures as "contributions by the maker of the expenditures, and expenditures by the candidate committee," but treats expenditures that are not controlled by or coordinated with a candidate as "independent" expenditures. The only restriction upon an independent expenditure is that the person making the expenditure must report it if the expenditure exceeds $1000 in a calendar year. Article XXVIII, § 5.

The coordination necessary to meet the *Buckley* test does not require formal collaboration between the parties or express approval by the candidate of the non-candidate's activities. Coordination simply requires the parties "to harmonize in a common action or effort" and to "work together harmoniously" in supporting the

[2] Secretary of State Rule 1.3, 8 CCR 1505-6, which states that a contribution "does not include an endorsement of a candidate or an issue by any person," must be read in the context of the *Buckley* decision.

candidate's election. *Rutt v. Poudre Education Association*, 05CA1718 (Colo. App. 7-20-06), ___ P.3d ___ (2006).

Were the advertisements coordinated with or controlled by Respondents"?

Because both the flyers and the yard sign in this case were prepared at the expense of non-candidates for the purpose of expressly advocating Respondents' election, the expenditures are contributions to and expenditures by Respondents *only if* they were coordinated with or controlled by the Respondents.

The yard sign

Respondents had no coordination of or control over either the production or use of the yard sign. The yard sign was produced and placed without their input or consent. Because there was no "common action or effort" between Respondents and Mr. Johnson in the production or use of the sign, it was an independent expenditure and not a contribution to Respondents. Respondents therefore had no obligation to report the yard sign as either an expenditure or a contribution.

The flyer

Unlike the yard sign, the flyers were coordinated and controlled by Respondents because they were delivered to Respondents' possession and actively used by them to promote their election. Respondents exercised control over the flyers by taking possession of them and handing them to voters. They exercised some minimal level of coordination with Ms. Thurlow by receiving them with the tacit understanding they would hand the flyers out to voters. This was sufficient "common effort" to make the value of the flyers a contribution to Respondents and an expenditure by them.

Was the contribution reportable?

Though the flyers were a contribution by Ms. Thurlow to Respondents, they were reportable only if they were of sufficient fair market value to trigger the reporting requirement. In special district elections, contributions and expenditures less than $20 aggregate value are not reportable. Section 1-45-108(1)(c). There is insufficient evidence to determine whether, in the hands of the individual Respondents, the flyers had a fair market value exceeding $20.

Although Complainant's evidence suggests it would cost roughly $613 to commercially produce 600 similarly described flyers, it is speculation to say the flyers produced by Ms. Thurlow in her home had similar value. Furthermore, although each Respondent handed flyers to some of the 431 voters who appeared at the poll, it is not known how many Ms. Thurlow actually produced, how many were handed out by Respondents in total, or how many each Respondent handed out. Only flyers actually handed to prospective voters would have any value as a contribution to Respondents' campaigns. That number is not known. Complainant bears the burden of proving each Respondent violated the law by receiving and not reporting a contribution in excess of $20. The evidence is too uncertain to prove that any Respondent received a

contribution that exceeded that value.

Summary

The yard sign produced by Mr. Johnson was not a contribution because neither its production nor use was controlled by or coordinated with Respondents. The flyer produced by Ms. Thurlow, on the other hand, was a contribution to Respondents because the flyers were accepted by Respondents and actively used by them to promote their election. Acceptance, possession and use of the flyers was sufficient control and coordination to make the flyers a contribution by Ms. Thurlow to Respondents. However, the evidence was not sufficient to prove that the fair market value of the flyers in the hands of any Respondent was greater than $20. Candidates and their committees are not required to file reports required by § 1-45-108 unless contributions or expenditures exceed an aggregate of $20 in value. Complainants' allegation that Respondents violated the law by failing to make reports is therefore dismissed.[3]

Agency Decision

The complaint against Respondents is dismissed. Because this ruling disposes of all issues raised by the complaint, the decision is subject to review by the Colorado Court of Appeals, pursuant to § 24-4-106(11), C.R.S. and Colo. Const. art. XXVIII, § 9(2)(a).

Done and Signed:
December 13, 2006

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ROBERT N. SPENCER
Administrative Law Judge

[3] Though not specifically alleged in the complaint, there is a legitimate argument that Respondents were required to register with the Douglas County Clerk and Recorder, as required by § 1-45-108(3), prior to accepting *any* contribution regardless of value. However, the latest any Respondent accepted or used the flyers was election day, May 2, 2006. That date is more than 180 days before the complaint was filed on November 2, 2006. Any complaint that Respondents failed to register was therefore time-barred by Art. XXVIII, § 9(2)(a), which requires that a complaint be filed within 180 days of the alleged violation.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above **ORDER GRANTING RESPONDENTS' MOTION FOR DISMISSAL and AGENCY DECISION** was placed in the U.S. Mail, postage prepaid, at Denver, Colorado to:

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and

William Hobbs
Secretary of State's Office
1700 Broadway, Suite 270
Denver, CO 80290

on this ___ day of April, 2007.

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Office of Administrative Courts